

Disciplinary Note

Provided by the Disciplinary Board of the New Mexico Supreme Court

A mother hired an attorney to obtain the maximum proceeds to which her son was entitled as his share of his deceased father's estate. Litigation appeared necessary because the boy's parents were never married, paternity had never been judicially established, and the father's family had attempted to exclude the boy's mother in handling the estate. She paid the attorney a retainer fee of \$1,500, against which he agreed to bill his time and services at the rate of \$100 per hour plus gross receipts tax.

The attorney advised bar counsel that he had clearly explained to his client in the beginning that the retainer was a "minimum fee" (i.e., it was not refundable in view of his agreement to begin working on the case immediately under rather difficult and exigent circumstances). The retainer was initially deposited into his trust account. By the end of the next day after receiving the retainer, the attorney had devoted approximately eight and a half hours to this case, but he nevertheless disbursed that day from his trust account to himself the entire retainer fee (an amount less than \$100 was left in the trust account to cover a filing cost and miscellaneous expenses).

The attorney advised bar counsel that such a disbursement of the entire retainer to his operating account was the customary and usual practice of attorneys in his community whenever a "minimum fee" was involved. He conceded, however, that whenever a material disparity subsequently arose between the amount of the "earned fee" and the retainer, a partial refund in appropriate instances might be in order. Presumably, such a refund would then have to be paid from the attorney's personal funds or operating account.

The attorney provided legal authorities for his position, which consisted mainly of opinions and case law from foreign jurisdictions. After

reviewing these authorities and the precedents established in New Mexico, bar counsel concluded that most jurisdictions which have adopted the Model Rules of Professional Conduct, including this state, have ruled that an attorney may not disburse from the trust account any funds for payment of legal fees until such time as those funds have actually been earned. As stated in *Matter of Eaby*, 28 SBB 27 (published July 6, 1989):

Clients may discharge their attorneys at any time with or without cause and are *always* entitled to a refund of money paid in advance which has not been earned *regardless of the language contained in the fee agreement.* (emphasis added)

It follows, therefore, that until the fee advance has been earned, such funds belong to the client and should be maintained in the attorney's trust account. In the matter at hand, although the entire retainer was eventually earned, the attorney was only entitled to pay himself on the day after receiving the retainer for the amount of services rendered up to that point in time, i.e., \$850 plus gross receipts tax for eight and a half hours of work.

Moreover, when an attorney pays fees for legal services out of the trust account, there is an obligation to account for such payment and services

to the client within a reasonably contemporaneous period of time, pursuant to SCRA 1986, Rules 16-105(C) or 16-115(A) and (B). In this matter, the attorney did not send a statement for services rendered until he had completed fifteen hours of work on the case. That billing statement indicated that the retainer had been disbursed from the trust account on the date of the billing statement, when in fact it had been so disbursed over two months earlier (the day after it was received, less a small amount for costs).

The reviewing officer in this matter concurred that the attorney should have maintained in his trust account any unearned portion of the retainer until it was actually earned. In this way, clients' funds will be protected from any financial inability by the attorney to refund the unearned portion should the lawyer be discharged before there has been an opportunity to fully earn the fee. Because the attorney here was merely following what he had been advised by other attorneys was standard practice, and since he had practiced for many years with a clear disciplinary record, the reviewing officer approved bar counsel's recommendation that the attorney be offered the opportunity to accept an informal admonition, with the proviso that bar counsel would submit for publication a Disciplinary Note for guidance to other lawyers in his community. The offer was accepted.

NM Association of Legal Support Staff Ethics Seminar

Ethics vs. Morality:

Innocence or Intentional?

3.6 Hours MCLE Ethics Credits

A panel consisting of The Honorable Pamela B. Minzner; William G. Gilstrap, Esq.; Billy R. Blackburn, Esq.; and Ellen Kelly, Esq. will conduct a seminar with the discussion focused on the "gray areas" of ethics. The seminar is scheduled for Saturday, February 2, 1991 from 9 a.m. to 12

noon at the White Winrock Motor Inn in Albuquerque. The seminar is sponsored by The New Mexico Association of Legal Support Staff. Registration fee is \$20 for members and \$40 for non-members. Return your registration to Gloria Novak, Marchiondo Law Firm, P. O. Box 568, Albuquerque, NM 87103 by January 30, 1991.